Sharifah Norziah bt Syed Mokhtar v Syarikat GPSM Holding Bhd & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–1230 OF 2010
SURAYA OTHMAN J
22 AUGUST 2014

Tort — Defamation — Qualified privilege — Whether plaintiff negated defendants' defence of qualified privilege by proving defamatory statements made against her were actuated by malice — Whether defence of justification failed as defendants took no action to show they believed the allegations they made against plaintiff were true

The plaintiff was a former manager of the first and second defendants ('D1' and 'D2'). The third defendant ('D3') was a director/executive chairman of both the companies and a former managing director of D2. During her tenure as manager, the plaintiff had been able to get shareholders of the companies to sell her 48,786 units of their shares but she could not get the shares transferred into her name because of opposition from the defendants who feared the companies might eventually come to be owned by the plaintiff if she was not prevented from acquiring more of the shares. In a suit filed in 2009, the plaintiff obtained a court order that the shares she had bought be registered in her name. Prior to the filing of the suit, D3 had written the plaintiff a letter, copied to the Securities Commission and to the company secretary for D1 and D2, stating that it was, inter alia, untrustworthy and dishonest of the plaintiff to have influenced shareholders to sell her their shares without the knowledge of the board of directors. In response, the plaintiff sent the defendants a letter of demand through her then lawyer, PW2. Pursuant to the letter of demand, PW2, on 25 November 2008, met with D3, another director (DW4) of the companies and a representative of the company secretary at the latter's office. According to PW2, DW3 told all attendees at that meeting that the defendants were opposed to the plaintiff registering her newly-acquired shares in her name because she had embezzled company money by tampering with a cheque. Pursuant to that meeting, D1 wrote a letter signed by D3 addressed to the defendants' solicitor and copied to the plaintiff's lawyer stating, inter alia, that the plaintiff had abused her position as manager by influencing shareholders to sell her their shares and that if she was not restrained she might eventually gain control the companies. The plaintiff filed the instant action claiming that the allegations made by D3 at the 25 November 2008 meeting and what was contained in the letters by D3 and D1 were grossly defamatory of her. The plaintiff claimed RM400,000 as general and exemplary damages and also sought an apology and an injunction against the defendants. The defendants

relied upon the defence of justification and qualified privilege.

Held, allowing the claim and awarding the plaintiff RM150,000 in general damages and dismissing her prayers for exemplary damages, an injunction and an apology:

(1) The court found the words uttered at the 25 November 2008 meeting and the statements in both the letters in question were defamatory of the plaintiff and were published to third parties. The letters, if read in their plain context, would suggest to a reasonable man that the plaintiff was a person who was untrustworthy, dishonest and had no integrity. They also clearly suggested the plaintiff had abused her position and power as manager by influencing other shareholders to sell her their shares without the knowledge of the board of directors. It imputed that the plaintiff was an irresponsible person who broke company rules and regulations and put her interest above that of the companies and also that she had committed criminal breach of trust (see para 17).

(2) The defendants failed to prove the defence of justification. They did not attempt to find out, investigate or verify that what they imputed against the plaintiff – that she had embezzled company money – was true. The auditor (DW2), who was not satisfied that there was misappropriation since the documents shown to her only showed a difference in the payment voucher, recommended that the management look into the matter further if they were concerned. But the defendants did not investigate the matter further or set up a domestic inquiry; neither was the plaintiff called upon to explain the alleged discrepancy. The initials on the vouchers and cheques in question were confirmed by DW3 and were duly signed by the directors. Thus, any alteration was impossible. The defendants also sought to rely on a letter suspending the plaintiff and a police report that was lodged against her, but since these documents were only made three years after the alleged defamatory statements were published the defendants could not rely upon them to prove justification (see paras 41–42 & 45).

(3) The defamatory statements made of the plaintiff at the 25 November 2008 meeting and in the two letters were made on a privileged occasion to persons who had an interest in receiving such statements and the defence of qualified privilege applied. However, the defence of qualified privilege was defeated by the plaintiff's success in showing that the publication of the defamatory statements was actuated by express or actual malice ie the defendants' jealousy over the plaintiff's accumulation of 48,756 units of shares and their fear that if the plaintiff was not prevented from buying more shares, the companies would one day be owned by her (see paras 57 & 68).

(4) The damages awarded had to reflect the hardship the plaintiff had to go through to vindicate herself. The defendants did not proffer any apology even after the plaintiff had won two suits she had brought in court to have the shares registered in her name and to get back the allowance and salary that was deducted after she was suspended and terminated from the defendants' employment. As the court was of the view an award of general damages sufficed, the prayers for an injunction, for an apology and for exemplary damages were disallowed (see paras 74–75).

[Bahasa Malaysia summary

Plaintif adalah bekas pengurus defendan-defendan pertama dan kedua ('D1 dan D2'). Defendan ketiga ('D3') adalah pengarah/pengerusi eksekutif kedua-dua syarikat dan bekas pengarah urusan D2. Sepanjang perkhidmatannya sebagai pengurus, plaintif telah mendapatkan pemegang saham syarikat tersebut untuk menjualnya 48,786 unit saham mereka tetapi dia tidak dapat memindahkan saham atas namanya kerana tentangan daripada defendan-defendan yang bimbang syarikat-syarikat mungkin akan dimiliki akhirnya oleh plaintif jika dia tidak dihalang daripada memperoleh saham lebih. Dalam guaman yang difailkan pada 2009, plaintif memperoleh perintah mahkamah bahawa saham yang telah dibelinya didaftarkan atas namanya. Sebelum pemfailan guaman itu, D3 telah menulis kepada plaintif sepucuk surat, salinan kepada Suruhanjaya Sekuriti dan kepada setiausaha syarikat untuk D1 dan D2, dengan menyatakan bahawa adalah, antara lain, tidak boleh dipercayai dan tidak jujur untuk plaintif mempengaruhi pemegang saham menjual saham mereka tanpa pengetahuan lembaga pengarah. Sebagai jawapan, plaintif telah menghantar defendan-defendan surat tuntutan melalui peguamnya masa itu, PW2. Berikutan surat tuntutan itu, PW2, pada 25 November 2008, telah berjumpa dengan D3, pengarah lain ('DW4') syarikat dan wakil setiausaha syarikat di pejabat setiausaha syarikat. Menurut PW2, DW3 memberitahu semua yang hadir di mesyuarat itu bahawa defendan-defendan menentang plaintif mendaftar saham yang baru diperolehinya atas namanya kerana dia telah melesapkan wang syarikat dengan mengubah cek. Berikutan mesyuarat itu, D1 telah menulis surat yang ditandatangani oleh D3 yang dialamatkan kepada peguam cara defendan-defendan dan salinan kepada peguam plaintif menyatakan, antara lain, bahawa plaintif telah menyalahgunakan jawatannya sebagai pengurus dengan mempengaruhi pemegang saham untuk menjual saham mereka kepadanya dan bahawa jika dia tidak dihalang dia mungkin akan akhirnya mendapat kawalan syarikat-syarikat itu. Plaintif telah memfailkan tindakan ini dengan mengatakan bahawa dakwaan-dakwaan yang dibuat oleh D3 dalam mesyuarat pada 25 November 2008 dan apa yang terkandung dalam surat-surat oleh D3 dan D1 adalah terlalu memfitnahnya. Plaintif telah menuntut RM400,000 sebagai ganti rugi am dan teladan dan juga memohon maaf dan injunksi terhadap defendan-defendan. Defendan-defendan bergantung kepada pembelaan justifikasi dan perlindungan bersyarat.

Diputuskan, membenarkan tuntutan dan mengawardkan plaintif RM150,000 untuk ganti rugi am dan menolak rayuannya untuk ganti rugi teladan, injunksi dan permohonan maaf:

(1) Mahkamah mendapati perkataan-perkataan yang diungkap pada mesyuarat 25 November 2008 dan kenyataan-kenyataan dalam kedua-dua surat yang dipersoalkan bersifat memfitnah plaintif dan telah diterbitkan kepada pihak-pihak ketiga. Surat-surat tu, jika dibaca dalam konteks biasa, mencadangkan kepada seorang yang munasabah bahawa plaintif adalah seorang yang tidak boleh dipercayai, tidak jujur dan tiada integriti. Mereka juga jelas mencadangkan plaintif telah menyalahgunakan kedudukan dan kuasanya sebagai pengurus dengan mempengaruhi pemegang saham lain untuk menjual kepadanya saham mereka tanpa pengetahuan lembaga pengarah. Adalah dikaitkan bahawa plaintif seorang yang tidak bertanggungjawab yang telah melanggar undang-undang dan peraturan syarikat dan telah melebihkan kepentingannya daripada syarikat-syarikat itu dan juga dia telah melakukan pecah amanah (lihat perenggan 17).

(2) Defendan-defendan telah gagal membuktikan pembelaan justifikasi. Mereka tidak cuba untuk mencari, menyiasat atau mengesahkan apa yang dikatakan mereka terhadap plaintif – bahawa dia telah melesapkan wang syarikat – adalah benar. Juruaudit ('DW2'), yang tidak berpuas hati bahawa terdapat penyelewengan kerana dokumen yang ditunjukkan kepadanya hanya menunjukkan perbezaan dalam baucar pembayaran, mencadangkan supaya pihak pengurusan meneliti perkara itu lagi jika mereka bimbang. Namun defendan tidak menyiasat perkara itu selanjutnya atau menubuhkan satu siasatan domestik; begitu juga plaintif tidak dipanggil untuk menjelaskan percanggahan yang dikatakan. Singkatan kepada baucar dan cek berkenaan telah disahkan oleh DW3 dan telah ditandatangani dengan sewajarnya oleh pengarah-pengarah tersebut. Oleh itu, apa-apa pengubahan adalah mustahil. Defendan-defendan juga diminta bergantung kepada surat yang menggantung kerja plaintif dan satu laporan polis telah dibuat terhadapnya, tetapi oleh kerana dokumen-dokumen tersebut hanya dibuat tiga tahun selepas kenyataan-kenyataan yang dikatakan berunsur fitnah itu diterbitkan defendan-defendan tidak boleh bergantung kepadanya untuk membuktikan justifikasi (lihat perenggan 41–42 & 45).

(3) Kenyataan-kenyataan berunsur fitnah yang dibuat terhadap plaintif pada mesyuarat 25 November 2008 dan dalam dua pucuk surat itu dibuat pada peristiwa istimewa kepada orang-orang yang mempunyai kepentingan dalam menerima kenyataan-kenyataan sedemikian dan pembelaan perlindungan bersyarat adalah terpakai. Walau bagaimanapun, pembelaan perlindungan bersyarat telah dipatahkan

dengan kejayaan plaintif yang menunjukkan bahawa penerbitan kenyataan berunsur fitnah didorong oleh niat jahat secara nyata atau sebenar, iaitu sikap cemburu defendan-defendan ke atas pengumpulan 48,756 unit saham dan kebimbangan mereka bahawa jika plaintif tidak dihalang daripada membeli saham lebih, syarikat-syarikat itu satu hari nanti akan dimiliki olehnya (lihat perenggan 57 & 68).

(4) Ganti rugi yang diawardkan perlu menggambarkan kesulitan yang perlu dilalui oleh plaintif untuk menjustifikasikan dirinya. Defendan-defendan tidak mengajukan apa-apa permohonan maaf walaupun selepas plaintif telah memenangi dua saman yang dimulakannya di mahkamah supaya saham-saham itu didaftarkan atas namanya dan untuk mendapatkan semula elaun dan gaji yang dipotong selepas dia digantung dan ditamatkan daripada bekerja dengan defendan-defendan. Oleh kerana mahkamah berpendapat award untuk ganti rugi am mencukupi, permohonan untuk injunksi, untuk permohonan maaf dan untuk ganti rugi teladan tidak dibenarkan (lihat perenggan 74–75).]

Notes

For cases on qualified privilege, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 770–796.

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1965] 1 MLJ 142b (refd)
Abdul Rahman Talib v Seenivasagam & Anor [1966] 2 MLJ 66, FC (refd)
Adam v Ward [1917] AC 309, HL (refd)
Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315; [1989] 1 CLJ Rep 321, HC (refd)
Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371, CA (refd)
Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Anor (No 3) [2005] 5 MLJ 561, HC (refd)
Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor [2010] 2 MLJ 492, HC (refd)
Datuk Harris Mohd Salleh v Datuk Yong Teck Lee & Anor [2012] 4 MLJ 372; [2012] 9 CLJ 743, HC (refd)
Hoe Thean Sun & Anor v Lim Tee Keng [1999] 3 MLJ 138, HC (refd)
Hulton (E) & Co v Jones [1910] AC 20, HL (refd)
Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd [1993] 1 MLJ 408, HC (refd)
International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86, FC (refd)
Lim Guan Eng v Utusan Melayu (M) Bhd [2012] 2 MLJ 394, HC (refd)
Mahadevi a/p Nadchatiram v Thiruchelvasegaram a/l Manickanickavasegar [2003] 4 MLJ 345, FC (refd)

Maisel v Financial Times Ltd [1915] 3 KB 336, CA (refd)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173, SC (refd)
Smith v Streatfeild and others [1913] 3 KB 764, KBD (refd)
State of New South Wales v Deren & Anor [1999] NSWCA 22, SC (refd)
Tan Sri Dato' Seri Halim bin Mohammad v Syed Ahmad bin Tun (Dr) Syed Nasir & Anor [2013] 8 MLJ 348, HC (refd)
Tjanting Handicraft Sdn Bhd & Anor v Utusan Melayu (M) Bhd & Ors [2001] 2 MLJ 574, HC (refd)

Legislation referred to

Companies Act 1965
Defamation Act 1957 s 6

Jefri Jaafar (Maznah & Jefri) for the plaintiff.
Swinder Singh Ram Singh (Raslan Loong) for the defendants.

Suraya Othman J:

PARTIES

[1] The plaintiff was the former manager of the first and the second defendants' companies. The first and second defendants are companies established under the Companies Act 1965, and among others, carry on with the business of a driving school. The third defendant is a director of the first and second defendants and was a former managing director of second defendant's company.

THE PLAINTIFF'S CASE

[2] The plaintiff's claim are for damages, an injunction and an apology for the defamatory statements made by the third defendant, Encik Harun Shafiee, in a meeting held on 25 November 2008 and also in the letters dated 22 August 2008 and 20 December 2008. The plaintiff alleged that the defendants willfully and maliciously published the defamatory statements with the intention to discredit the plaintiff to show that she is untrustworthy and had misappropriated or siphoned off the companies' monies by forging the companies cheques and had thus committed criminal breach of trust ('CBT') in her employment. The said defamatory statements, also, among others, insinuate that the plaintiff, as a manager, is irresponsible and has no integrity and had abuse her position for self gain at the expense and interest of the companies by influencing the other shareholders to sell their shares in the companies to her, which act, is against the companies regulation.

THE DEFENDANTS' CASE

[3] The defendants had refuted all the allegations made by the plaintiff. The defendants pleaded that the letters dated 22 August 2008 and 20 December 2008 is a prerogative of the defendants to write as employer in managing the companies affairs. The defendants raised two main defences, namely:

(a) the defence of justification; and

(b) the defence of qualified privilege.

ISSUES TO BE TRIED

[4] The parties agreed that the issues to be tried in the present case are as follows:

(a) whether the defendants had uttered and or published the defamatory remarks or published the statements which are slanderous in nature against the plaintiff during the meeting on 25 November 2008;

(b) whether the defence of qualified privilege is applicable on the facts of the case especially as per the alleged statement by the third defendant to the plaintiff during the meeting dated 25 November 2008;

(c) whether the defendants had uttered or published the defamatory remarks that is allegedly to be libelous pursuant to the letter dated 20 December 2008 and 22 August 2008 issued to Messrs Ahmad Fuad Amin & Partners and copied to Messrs Hadmin Zahar & Rohaine Shariffudin and issued to the plaintiff and copied to the Securities Commission and the defendant's company secretary;

(d) whether the defence of qualified privilege is applicable towards the statement pursuant to the letter dated 20 December 2008; and

(e) whether the defence of justification is applicable pursuant to the letter dated 22 August 2008.

FINDINGS OF COURT

[5] What are the ingredients a plaintiff has to prove to establish a cause of action in a defamation suit? It is trite law that to succeed in a suit of defamation a plaintiff has to establish three basic elements namely;

(a) the words or statements are defamatory;

(b) the words or statements must refer to the plaintiff; and

(c) the words or statements were published to a third party (see *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315; [1989] 1 CLJ Rep 321).

Whether the words or statements are defamatory

[6] The plaintiff pleaded in para 5 of the statement of claim that on 25 November 2008 the defendants represented by the third defendant ('DW3') Encik Harun Shafiee, had attended a meeting together with Puan Rohanie Mohd Shim, the plaintiff's former solicitor ('PW2'), in the presence of Encik Zawawi bin Ismail ('DW4'), the first defendant's director. During this meeting the third defendant (DW3) on behalf of the first and the second defendants is alleged to have uttered slanderous remarks as follows: 'Puan Sharifah ambil duit syarikat dengan cara palsukan cek syarikat (Puan Sharifah has taken the companies money by forging the companies' cheques)'. The defamatory remarks made by the third defendant were repeated in writing in the first defendant's letter dated 20 December 2008, signed by the third defendant, addressed to Messrs Ahmad Fuad Amin & Partners (the defendants' solicitor) and copied to Messrs Hadmin Zahar & Rohaine Shariffudin (the plaintiff's solicitor). Further, pursuant to a former letter dated 22 August 2008, the third defendant had issued another letter addressed to the plaintiff and carbon copied to the Securities Commission and the defendant's company secretary office.

[7] The statement contained in the letter dated 20 December 2008 is reproduced below:

paragraph 2

Sukacita dimaklumkan bahawa Puan Sharifah Norziah Binti Syed Mokhtar merupakan kakitangan kami. Beliau bertugas sebagai pengurus di syarikat GPSM Holding Berhad dan telah diamanahkan untuk menjaga kepentingan kami/para pemegang saham syarikat tersebut. Malangnya *beliau telah menyalahgunakan kuasa beliau dengan mempengaruhi pemegang saham lain supaya menjual saham mereka kepada beliau dan beliau berjaya memperolehi saham berjumlah 48,786 unit. Sekiranya perkara tersebut tidak disekat mungkin satu hari nanti syarikat ini akan berpindah milik ke tangan beliau.*

paragraph 3

Pada 10 Disember 2008 kami telah berbincang dengan Puan Adzhaliza binti Mohd Nor dan Encik Razali berkaitan dengan perkara tersebut. Dalam perbincangan tersebut kami telah menyerahkan:

2.4 *Fail kes penyelewengan di cawangan AU3;*

2.5 *Fail peribadi Puan Sharif ah Norziah binti Syed Mokhtar ...* (Emphasis added.)

[8] The statement contained in the letter dated 22.8.2008 is reproduced below:

paragraph 2.2

Seorang pekerja yang dilantik sebagai pegawai/Eksekutif yang telah diamanahkan oleh syarikat tidak sepatutnya mempengaruhi pemegang syer lain supaya menjual syer mereka kepada puan tanpa sebarang maklumat kepada Lembaga Pengarah. Untuk makluman syarikat ini adalah syarikat orang ramai/milik para pengusaha sekolah memandu kereta bumiputera Selangor dan Wilayah Persekutuan, bukan syarikat milik peribadi. *Tugas puan adalah untuk menjaga kepentingan orang ramai dan bukan untuk kepentingan peribadi. Kami menganggap bahawa perbuatan tersebut adalah tidak beramanah dan bermaruah.* (Emphasis added.)

[9] In *Gatley on Libel and Slander*, (11th Ed) 2008 at p 12 it defines defamatory as:

There is no wholly satisfactory definition of a defamatory imputation. Three formulae have been particularly influential:

(1) Would the imputation tend to lower the plaintiff in the estimation of right-thinking members of society generally?

(2) Would the imputation tend to cause others to shun and avoid the claimant?

(3) Would the words tend to expose the claimant to hatred, contempt or ridicule?

[10] Gopal Sri Ram JCA (as His Lordship then was), in *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 at p 374 stated:

In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory.

[11] In determining whether the statement is capable of being defamatory, the words must be read in the context in which they were used (see *Lim Guan Eng v Utusan Melayu (M) Bhd* [2012] 2 MLJ 394 at pp 403–404).

[12] Back to our instant case, with reference to the defamatory statements as pleaded in the statement of claim, the plaintiff alleged that the words and statements caused to be published by defendants, if read in their ordinary and natural meaning, is understood to mean that the plaintiff:

(a) is irresponsible and has no integrity;

(b) is dishonest and untrustworthy;

(c) had misappropriated or siphoned off the companies money and had committed criminal breach of trust; and

(d) a person who breaches the companies' rules and regulations and abuse her position and power as a manager for the sake of her own personal gain and interest above that of the company.

[13] During the trial, PW2, Puan Rohanie Mohd Shim, the plaintiff's former solicitor, confirmed that the words were uttered during the meeting on 25 November 2008 by the third defendant (DW3) Encik Harun Shafiee, on behalf of the first and the second defendants. DW1, Encik Razali Md Nor, the defendants' solicitor, under cross-examination agreed to the suggestion that such an accusation, if levelled against the plaintiff would injure a person's reputation. The plaintiff also testified that those words and statements were made when she was still working for the defendants and she was ridiculed by her colleagues and thus inevitably exposed to hatred.

[14] The defendants, on the other hand, contended that the words or statements complained of in their ordinary meaning are not slanderous and libellous. The defendants further argued that it is not sufficient that some persons might have understood the words complained of as conveying an imputation of the plaintiff being untrustworthy, dishonest or a thief. The test would be the view of a reasonable man under the circumstances and not merely the views of some persons.

[15] With due respect, I disagree with the contention of the defendants. Under s 6 of the Defamation Act 1957 (Act 286), it is unnecessary to prove special damage. It is clear that the words or statements had attacked the moral character of the plaintiff and are slanderous of her in her capacity as manager of the first and second defendants. This was confirmed by DW4, Encik Zawawi Ismail, a director in the first and second defendant during cross-examination:

S: Encik Zawawi, dalam makna atau dalam perkataan biasa yang senang kita faham seseorang yang dituduh untuk menyelewengkan duit syarikat boleh dianggap sebagai melakukan pecah amanah duit syarikat. Setuju, Encik Zawawi?

J: Ya.

S: Encik Zawawi, dalam pengalaman kamu sebagai pengarah, pecah amanah, tindakan-tindakan seleweng duit, pecah amanah ini adakah sesuatu yang kecil ataupun sesuatu yang serius?

J: Sesuatu yang serius.

S: Setuju atau tidak, ini cadangan saya tuduhan-tuduhan sebegini, seleweng duit, pecah amanah kepada seseorang ini, dalam keadaan biasa akan merosakkan reputasi, maruah orang yang dituduh itu? Setuju tak?

J: Dalam keadaan biasa, mungkin.

[16] Indeed, the words 'Puan Sharifah ambil duit syarikat dengan cara palsukan cek syarikat' are slanderous since it imputes that the plaintiff had committed CBT by misappropriating or siphoning the companies money by forging the companies cheques. This is a serious allegation, as agreed by DW4, which if it has a basis, can render the plaintiff to a criminal charge in the law courts.

[17] The statements in the letters dated 20 December 2008 and 22 August 2008, if read in their plain context, seems to suggest to a reasonable man that the plaintiff is a person who is untrustworthy, dishonest and has no integrity ('tidak beramanah dan bermaruah'). It also clearly suggest that the plaintiff has abuse her position and power as a manager by influencing the other shareholders to sell their shares in the companies to her without informing or getting the required approval of the board of directors. It imputes on the plaintiff as being a person who is irresponsible, who breaks the companies' rules and regulations and who put her interest above that of the companies. It also alleged that the plaintiff has committed CBT. As such from the facts I find the words uttered in the said meeting on 25 November 2008 and statements in both the said letters to be defamatory of the plaintiff.

Whether the words and statements refer to the plaintiff

[18] It is trite law that in a slander and libel action, the words and statements complained of must refer to the plaintiff. His Lordship Lim Beng Choon J in *Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd* [1993] 1 MLJ 408 states that:

> It is an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff'. The test which the plaintiff has to furnish an answer to satisfy the court is whether the words would reasonably in the circumstances lead persons acquainted with the plaintiff to believe that he was the person referred to.

[19] Let us examine the words and statements complained of in the present case. The words uttered on 25 November 2008 during the meeting clearly refers the plaintiff by name. It was affirmed by PW2, Puan Rohanie Mohd Shim that the third defendant (DW3) Encik Harun Shafiee had indeed uttered the words as pleaded in para 5 of the statement of claim. It is trite law that it is not necessary that the plaintiff must be mentioned by name. So long as she could be identified as the person targeted, that will be sufficient (see *Datuk Harris Mohd Salleh v Datuk Yong Teck Lee & Anor* [2012] 4 MLJ 372; [2012] 9 CLJ 743 quoted *Hulton (E) & Co v Jones* [1910] AC 20).

[20] In *Tjanting Handicraft Sdn Bhd & Anor v Utusan Melayu (M) Bhd & Ors* [2001] 2 MLJ 574 at p 592, the court states:

Identity of party

In an action for slander of goods for libel, it is not necessary that the words should refer to the plaintiff by name, so long as the words would be understood by reasonable people to refer to the plaintiff. The court must be satisfied as to whether the libel designated the plaintiff in such a way as to let those who know him understand that he was the person referred to. It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person being referred to. This is what the Australian High Court meant when it said in *David Syme & Co & Anor v Canavan* [1918] 25 CLR 234 at p 238:

> ... The test of whether words that do not specifically name the plaintiff refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? That does not assume that those persons who read the words know all the circumstances or all the relevant facts. But although the plaintiff is not named in words, he may, nevertheless, be described so as to be recognized; and whether that description takes the form of a word picture of an individual or the form of a reference to a class of persons of which he is or is believed to be a member, or any other form, if in the circumstances, the description is such that a person hearing or reading the alleged libel would reasonably believe that the plaintiff was referred to, that is a sufficient reference to him.

[21] In our instant case the plaintiff was identified by her name 'Puan Sharifah'. In fact the meeting was held upon the plaintiff's request. Thus there is no dispute that the words uttered were in reference to the plaintiff.

[22] With regards to the letters dated 20 December 2008 and 22 August 2008, the letters referred to the plaintiff by name. There is no dispute to that. The letters must be read as a whole. Where the claimant is expressly identified by name, it is not necessary to produce evidence that anyone to whom the statement was published did identify the claimant (see *Gatley on Libel and Slander* (11th Ed) para 7.3 at p 214). As such it can be concluded that the defamatory words and statements as pleaded in paras 5–6 and 10 of the statement of claim refers undeniably and unquestionably to the plaintiff.

Whether the words and statements were published

[23] To establish the ingredient of whether there is publication of the slanderous and libelous statements, the defamatory matter must be published to a third party other than the plaintiff. In *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173 at p 176, the court held:

> In order to constitute publication, the defamatory matter must be published to a third party, and not simply to the plaintiff. By publication is meant the making known of the defamatory matter, after it has been written, to some person other than the person of whom it is written. The uttering of a libel to the party libelled is

no publication for the purposes of a civil action (citing *Wennhak v Morgan* (1888) 20 QBD 635). A

[24] This principle has been referred to in the recent High Court case of *Tan Sri Dato' Seri Halim bin Mohammad v Syed Ahmad bin Tun (Dr) Syed Nasir & Anor* [2013] 8 MLJ 348. B

[25] The slanderous words uttered during the meeting held on 25 November 2008 by the third defendant (DW3) Encik Harun Shafiee was confirmed by PW2, Puan Rohanie Mohd Shim. The statement by PW2 was not challenged during cross-examination. The examination-in-chief of PW2 are reproduced below: C

S3: Bolehkah anda maklumkan kepada mahkamah adakah anda telah mengadakan apa-apa perjumpaan dengan defendan-defendan pada tarikh 25.11.2008 tersebut? D

J3: Ya. Pada tarikh tersebut satu perjumpaan telah dibuat antara saya dengan defendan ketiga yang merupakan pengarah defendan pertama dan defendan kedua. Defendan ketiga datang bersama dengan Encik Zawawi bin Ismail yang dimaklumkan kepada saya juga merupakan pengarah defendan pertama dan defendan kedua. Perjumpaan tersebut telah diadakan di pejabat setiausaha defendan-defendan. Pejabat setiausaha defendan-defendan telah diwakili *oleh seorang wanita berbangsa China.* E

S4: Apakah sebabnya perjumpaan tersebut diadakan? F

J4: Sebenarnya perjumpaan tersebut telah diadakan berhubungan dengan aduan dan bantahan yang dibuat oleh plaintiff terhadap defendan-defendan melalui notis tuntutan bertarikh 17.11.2008 yang dihantar oleh firma guaman saya. G

...

S6: Apa yang berlaku di dalam perjumpaan tersebut?

J6.1: *Di dalam perjumpaan tersebut defendan ketiga telah menyatakan dan membuat kenyataan bahawa secara nyata bahawa 'Puan Sharifah ambil duit syarikat dengan cara palsukan cek syarikat'. Kenyataan tersebut telah dibuat di hadapan semua pihak yang hadir dan didengari oleh semua.* H

J6.2: *Defendan ketiga juga telah membuat kenyataan bahawa cek-cek berjumlah RM300.00 telah dipalsukan oleh Puan Sharifah kepada RM3,300.00 iaitu dengan menambah perkataan Tiga Ribu di bahagian hadapan perkataan Tiga Ratus dan menjadikan cek tersebut 'Tiga Ribu Tiga Ratus Sahaja'.* I

J6.3: Defendan ketiga menambah bahawa pemalsuan cek dan penyelewengan yang didakwa dilakukan oleh plaintif tersebut adalah alasan kenapa saham-saham plaintif tidak didaftarkan. (Emphasis added.)

[26] From the evidence of PW2, it is clear that the defamatory words was published to third parties other than the plaintiff during the said meeting. It was then confirmed by the third defendant (DW3) Encik Harun Shafiee himself. During cross-examination, DW3 testified as follows:

S: Tuan Haji, dalam mesyuarat tersebut, adakah Tuan Haji ingin mengekalkan jawapan Tuan Haji bahawa Tuan Haji tidak membuat apa-apa pernyataan bahawa plaintif telah selewengkan duit syarikat, macam mana jawapan Tuan Haji di jawapan no. 5, penyata saksi?

J: Ya, saya menafikan.

40. S: Tuan Haji, saya percaya Tuan Haji telah berada didalam mahkamah dalam perbicaraan yang lepas dan peguam Puan Rohanie yang hadir pada masa tersebut telah memberi keterangan bahawa Tuan Haji ada sebut plaintif telah selewengkan duit syarikat. Adakah Tuan Haji masih hendak kekalkan atau tidak sebutkan perkataan itu?

J: Ya.

...

S: *Tuan Haji, kalau begitulah jawapan Tuan Haji bahawa Puan Sharifah patut dapat RM300.00 tapi yang keluar RM3,300.00. Setuju tak dengan cadangan saya bahawa apa yang disebut oleh Tuan Haji kepada Puan Sharifah telah selewengkan cek-cek syarikat, dengan cara tukarkan jumlah dalam cek. Setuju tak bahawa itu maksud yang hendak disampaikan kepada peguam Puan Rohanie? Setuju atau tidak setuju?*

J: *Setuju.* (Emphasis added.)

[27] Thus the defamatory statements was made in the presence of Puan Rohaine Mohd Shim (PW2), Encik Zawawi Ismail (DW4) and a Chinese lady from the defendant's secretary office. As such the plaintiff has proven that the slanderous statements were published to third parties.

[28] Let us now examine the statements in the letters dated 20 December 2008 and 22 August 2008. The letter dated 22 August 2008 was carbon copied to the Securities Commission and the defendant's company secretary. The letter dated 20 December 2008 was addressed to Messrs Ahmad Fuad Amin & Partners and copied to Messrs Hadmin Zahar & Rohaine Shariffudin. Both letters were signed by the third defendant (DW3) Encik Harun Shafiee as executive chairman. During trial, the third defendant had denied that the letter dated 22 August 2008 was issued to the Securities Commission as well as to the

defendant's company secretary's office. The evidence is reproduced below:

S:	Tuan Haji, sekarang kita merujuk kepada jawapan no. 10 penyata saksi kamu. Ini berkaitan dengan surat bertarikh 22.8.2008. Tuan Haji boleh merujuk dimukasurat 091 – 092 (CBD-A) – surat daripada GPSM kepada plaintif. Saya terus ke mukasurat 092. Tuan Haji, boleh merujuk di mukasurat 092 tersebut, adakah kamu boleh sahkan, ada salinan kepada Suruhanjaya Sekuriti?
J:	Ada. Kita cuma tulis disini, tapi kita tidak menghantar salinan (cc copy) tersebut.
S:	Kepada setiausaha syarikat, kamu hantar?
J:	Tidak hantar.

[29] The question here is whether there is publication of the letter dated 22 August 2008 if the third defendant did not send the letter to the Securities Commission and the secretary's office as he so testified.

[30] In *Gatley on Libel and Slander* (11th Ed) at para 6.14 p 177 states:

> Proof of publication. The fundamental principle is that the matter must be communicated to a third party in such a manner as is capable of conveying the defamatory imputation about the claimant. *However it is not necessary in every case for the claimant to prove directly that the words complained of were brought to the actual attention of some third person. In this sense, if he proves facts from which it can be inferred that the words were brought to the attention of some third person, he will establish a prima facie case.* (Emphasis added.)

[31] Thus, applying the above principle to the present case, there is no doubt that the defamatory statements made vide letters dated 22 August 2008 were sent to the Securities Commission and the secretary's office despite the fact that the third defendant (DW3) in evidence denied doing so. This is so since the fact that the third defendant had carbon copied the letter to the Securities Commision and the secretary's office can be inferred that the letter was sent to them.

[32] In respect of the letter dated 20 December 2008, Puan Rohaine Mohd Shim (PW2) testified that she had received the letter dated 20 December 2008 and agreed that the said letter was issued pursuant to the meeting held on 25 November 2008. As such both letters were published to third parties and thus the third element of defamation has been established by the plaintiff.

DEFENCE OF JUSTIFICATION

[33] The defendants have raised the defence of justification. In order for the defendants to succeed in their defence of justification, it is incumbent upon

them to prove the truth of the allegations made against the plaintiff. The burden to prove that the defamatory statements are true lies with the defendants (see *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 and *Abdul Rahman Talib v Seenivasagam & Anor* [1966] 2 MLJ 66).

Auditors report, show cause letters and police report

[34] The defendants' testified that there had been show cause letters issued to the plaintiff and a police report had also been lodged by the defendants for the alleged misappropriation of the defendants' funds. The defendants contended that the plaintiff failed to reply to the show cause letters. To support their case that the plaintiff had forged the cheques and misappropriated the companies money, the defendants brought Ms Chai Yee Wan ('DW2') the audit manager from Paul Chong PCCO PLT to testify in court. Let us look at the testimony of the auditor.

[35] Ms Chai Yee Wan (DW2) testified that at a meeting with the defendants she was shown some vouchers and bank statements which amount did not tally with each other. This discrepancy in the documents was not discovered by her through the course of her auditing of the companies account but was shown to her by the defendants who had at that time accused the plaintiff of swindling the companies' money. On that score, she recommended that the management look into the matter and if necessary take disciplinary action against the staff (the plaintiff) concerned to recover the monies such as by monthly deduction of her salary.

[36] Upon examination and evaluation of the defendants' evidence, the show cause letters issued to the plaintiff, though was not replied by her, is not able to sustain the fact that she had forged the cheques. There was no police report lodged on such allegation then (at the material time) or a reasonable time after the allegation was made which allegation amounts to a criminal action. In fact the police report was made three years later.

[37] Ms Chai Yee Wan when referred to p 189 CBD A, agreed in cross-examination that she was informed and made aware by defendant's management on the alleged misappropriation and she herself did not discover the discrepancy through her auditing. She emphasised that she did not make a finding that there was misappropriation but recommended that the defendants look further into the matter. The relevant parts of the evidence of the auditor, Ms Chai Yee Wan, are reproduced below:

> Q: Ms. Chai, could you please perhaps enlighten the court. Having answered my question, there was no such investigation conducted, there was no such report submitted by the defendant companies pertaining to the allegation of the misappropriation? There was no

request for the person, my client to attend for the interview, discussion and how could this particular observation at page 189 (CBD-A) on what basis and how could this particular observation been made by your office pertaining to discrepancy of RM16,000.00 where there was no such investigation whatever been conducted?

A: *During the meeting, we were informed on the discrepancy, we were shown some document in which the voucher and the bank statement clearing amount, it does not tie-up.*

106. Q: So, your word being observe, what was being stated on page 189 was surely observation made during the meeting with the defendant, correct?

A: Yes.

...

Q: Could you please refer to your answer 17, 18 and 19 of your witness statement. Ms. Chai, again here, we are talking about RM16,000.00 that actually appears on page 189, the one says about discrepancy sum and irregularities. Firstly Ms. Chai, can you please re-confirm that this particular RM16,000.00 as stated under your answer 17 was actually what was being inform by the defendant?

A: Yes.

129. Q: Then you were satisfied that the RM16,000.00 was actually been misappropriated. Are you saying that Ms. Chai based on you analysis, based on you observation during the meeting? *Are you saying that you did or you was satisfied that the sum was misappropriated as alleged by the defendant?*

A: *No.*

130. Q: You are not satisfied yet that's the allegation by the defendant. What are you saying now?

A: Yes.

131. Q: Yes or no, Ms Chai?

A: No.

YA Hakim: You were not satisfied what do you mean? You are not satisfied macam mana? Were you satisfied that the plaintiff has misappropriated the money? So, why are you not satisfied?

Saksi: *Because it's only a difference stated in the payment voucher.*

YA Hakim: *So, you were not satisfied there was misappropriation, that's what you are saying?*

Saksi: *Yes.* (Emphasis added.)

[38] Thus having heard the auditor, Ms Chai Yee Wan's testimony, have the

defendants prove justification in alleging that the plaintiff has swindled or misappropriated the defendants' money. Ms Chai had recommendation the management to look into the matter since she is not satisfied that there was misappropriation since the documents that were shown to her only showed a difference in the payment voucher. The defendants did not investigate into the matter further as recommended by the auditor. There was no domestic inquiry set up to investigate the allegation and the plaintiff was not called to explain the alleged discrepancy. Thus can the defendants rely on the defence of justification in these circumstances?

[39] Having examined the cheques at pp 729–733 CBD-B and the payment vouchers at pp 52–55 CBD-C1, and also another set of payment vouchers at pp 6–64 CBD-C1, it clearly shows that the sum issued by the two sets of vouchers do tally with the sum stated in the cheques which were duly signed by the three signatories. DW3, Encik Harun Shafiee during cross-examination testified:

> S: Walaupun kamu tidak setuju bahawa pengurus boleh membuat pembayaran-pembayaran sedemikian, elaun-elaun pengarah-pengarah, Cek-cek yang dikeluarkan pada tahun 2004, 2005 dan 2006 yang menjadi persoalan pada hari ini, semuanya telah ditandatangani oleh pengarah-pengarah defendan, betul? Tiga pengarah defendan tandatangan, betul?
>
> J: Betul.

[40] The initials on the vouchers and cheques were confirmed by DW3. It was duly signed by the directors and thus confirmed that any alteration was impossible. As such, based on the reasons above, has the defendants succeeded in raising the defence of justification. The answer is no.

Suspension letter and police report both dated 28 July 2011

[41] The defendants tried to adduce evidence to support the defence of justification by producing the suspension letter dated 28 July 2011 and a police report lodged on the same dates. These evidences were acts which occurred after the publication of the defamatory statements on 22 August 2008, 20 December 2008 and the meeting on 25 November 2008. On this issue, *Gatley on Libel and Slander* (11th Ed) at para 11.8 p 319 states:

> The general rule is that the imputation must be justified by reference to the facts as they were at the time when it was published. *A defendant may not rely on matters which occurred after the date of publication complained of in order to support a plea that there was objectively speaking, reasonable grounds for suspecting that the claimant performed the actions attributed to him in that publication.* (Emphasis added.)

[42] The defendants' evidence shows that there were no attempts to find out, investigate or verify whether what the defendants had imputed on the plaintiff were true. The auditor, Ms Chai Yee Wan, had recommended in her report dated 13 September 2007 that the management look into this matter, and if necessary take disciplinary action against the staff concerned. This was not done. No domestic inquiry was conducted against the plaintiff despite the fact that the sum alleged to have been misappropriated by the plaintiff was quite substantial.

[43] In the case of *State of New South Wales v Deren & Anor* [1999] NSWCA 22, Priestly JA, in accepting that the same consideration probably apply whether the facts occur before or after publication said that the basis of the 'reasonable time' requirement stated in case of *Maisel v Financial Times Ltd* [1915] 3 KB 336 was that:

> It is open to a judge to rule that evidence of an acts by a plaintiff could not rationally enable a conclusion of fact to be drawn and therefore should not as a matter of law be allowed to go before a jury considering that issue of fact when the time between the act or acts the defendant wished to rely on and the defamation was such that there was no relation between the act or acts and the imputation the defendant was seeking to justify.

[44] Pickford LJ, in *Maisel v Financial Times Ltd* [1915] 3 KB 336 at p 342, said:

> It may be that the act which he did was so long after the libel that it would have no relevance at all having regard to the time of the libel. If that were so, it would not be admissible.

[45] It is very clear from the evidence that the suspension letter as well as the police report, both dated 28 July 2011, were only made three years after the alleged defamatory statements had been published (2008). As such the defendants cannot rely on these documents as they were not made at the material time or a reasonable time after the defamatory statements were published. Thus, based on the above facts, the defendants failed to prove the defence of justification against the plaintiff.

DEFENCE OF QUALIFIED PRIVILEGE

[46] The defendants also raised the defence of qualified privilege. The defendants contended that a privileged occasion is created when the defendants issued the letters dated 22 August 2008 and 20 December 2008 respectively. It was submitted that the defendants were using the privileged occasion honestly. The letters were issued bona fide and it was done in the best interest of the defendants' companies. The plaintiff, on the other hand, contended that the slanderous statements made in the meeting held on 25 November 2008 and in

the letters dated 22 August 2008 and 20 December 2008 respectively, were indeed actuated and motivated by malice.

[47] Based on the facts before this court, it is clear and not in dispute that the meeting held on 25 November 2008 was in the presence of the plaintiff's solicitor, Puan Rohanie Mohd Shim (PW2) and the defendants' director that is Encik Harun Shafiee (DW3), Encik Zawawi Ismail (DW4) who is a director of the first and second defendants' companies and a Chinese lady from the secretary office. The question here now, is whether the communication or statements made by Encik Harun Shafiee (DW3) in the meeting on 25 November 2008 is protected under the defence of qualified privilege? *What is qualified privilege?*

[48] In the case of *Adam v Ward* [1917] AC 309, Lord Atkinson opined that:

> ... privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

[49] The principle of qualified privilege had been categorised under the three tests as outlined by Abdul Malik Ishak J, (as His Lordship then was), in the case of *Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Anor (No 3)* [2005] 5 MLJ 561 at p 568:

> It follows that in our judgment, when applying the present English common law of qualified privilege, the following questions need to be answered in relation to any individual occasion.
>
> (1) Was the publisher under a legal, moral or social duty to those to whom the material was published (which in appropriate cases, as noted above, may be the general public) to publish the material in question? (We call this the duty test).
>
> (2) Did those to whom the material was published (which again in appropriate cases may be the general public) have an interest to receive that material? (We call this the interest test).
>
> (3) Were the nature, status and source of the material, and the circumstances of the publication, such that the publication should in the public interest be protected in the absence of proof of express malice? (We call this the circumstantial test).

[50] Wan Hamzah SCJ (as His Lordship then was), in the Supreme Court case of *S Pakianathan v Jenni Ibrahim* at p 178 had this to say:

> However, there are occasions upon which, on grounds of public policy and

convenience, a person may, without incurring legal liability, make statements about another which are defamatory and in fact untrue: *Watt v Longsdon* [1930] 1 KB 130. These occasions are called occasions of qualified privilege. A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty although it contains a criminatory matter which, without this privilege, would be slanderous and actionable: *Harrison v Bush* (1885) 5 E & B 344; 119 ER 509. The duty may be legal, social or moral, and the person to whom the communication is made must have a corresponding interest or duty to receive it. The reciprocity is essential: *Adam v Ward* [1917] AC 309 334.

[51] The crux of the defence of qualified privilege lies in the reciprocity of interest between the maker (the third defendant) and the recipients (Securities Commission, company secretary and the plaintiff's solicitor).The plea of qualified privilege is that: there must be a common interest in the matter between the person issuing and the person receiving the communication. In the passage from the case of *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142b at p 154, it is stated:

A common interest for the purpose of the defence of qualified privilege to an action for libel occurs where the words complained of as defamatory were published in pursuance of an interest or of a duty, legal, social, or moral, to publish them to the person to whom they were published and the person to whom they published had a corresponding interest or duty to receive them. The reciprocity is essential. The bona fide belief of the defendant that there existed such an interest or that he was under such a duty to make the communication is immaterial, for the thing which is relevant to the question whether or not the occasion was privileged is the existence in fact of the duty or interest and not merely the defendant's belief in the existence of the one or the other.

[52] In our present case, the alleged defamatory words were communicated by Encik Harun Shafiee (DW3) during the said meeting on 25 November 2008 to Puan Rohaine Mohd Shim (PW2), Encik Zawawi Ismail (DW4) and one Chinese lady who is from the company secretary's office. The question here is whether the defence of qualified privilege is applicable towards the statements pursuant to the letter dated 20 December 2008.

[53] I am of the view that the statements made by DW3, was made on a privilege occasion since Puan Rohanie Mohd Shim is the plaintiff's solicitor at the material time. Further, the discussion relates to the registration of shares bought by the plaintiff from the shareholders of the defendants companies and the alleged defamatory statements communicated by DW3 were the reasons why such transfer of shares was not allowed by the management to be registered in the plaintiff's name. The statements, therefore, were published to those persons who have an interest to receive such statements.

[54] Further, the defendants contended that the letter dated 20 December 2008 was issued in the genuine belief that the shares bought by the plaintiff could not be registered based on the 463rd board of directors' meeting held on 20 August 2008.The alleged letter was signed by the third defendant Encik Harun Shafiee and addressed to Messrs Ahmad Fuad, Amin & Partners the defendants solicitor. The third defendant has a legal duty to write such a letter to their solicitor and their solicitor had an interest to receive it. The letters were also carbon copied to Messrs Hadmin Zahar & Rohaine Shariffudin who was acting on behalf of the plaintiff who has a corresponding interest or duty to receive it. In the case of *Mahadevi a/p Nadchatiram v Thiruchelvasegaram a/l Manickanickavasegar* [2003] 4 MLJ 345, the court held that communication between solicitors on behalf of their clients in the course of legal proceedings is privileged.

[55] The letter dated 22 August 2008 was issued to the plaintiff herself and carbon copied to the Securities Commission and the company secretary office. The defendants, during trial, averred that the letter was not sent out to the Securities Commission and the company secretary office even though it was copied to them. I had decided by inference that the letter was received by the Securities Commission and the company secretary office since it was carbon copied to them. These people had a legal duty to receive the letter since it relates to the shares of the companies of the defendants.

[56] In the book *The Law of Defamation in Singapore and Malaysia* (2nd Ed) at p 70 by Keith R Evans states:

> although defamatory and not true, may be subject to qualified privilege if the defendant can show that they were made in the conduct of its affairs, in the protection of his own interest as long as the statements are relevant to the subject matter in question, *provided the statements are made bona fide and are fairly relevant to the accusations made against that person* (citing the case of *Lee Kuan Yew v JB Jeyaretnam* [1982] 1 MLJ 239). (Emphasis added.)

[57] Based on the facts and the cases above, I am of the view that the slanderous and the defamatory statements were made or communicated on a privilege occasion and the defence of qualified privilege applies in this case.

[58] It is trite law that once the defendants has succeeded in raising the defence of qualified privilege, the burden is shifted to the plaintiff to prove that the statements were not bona fide but actuated by malice.

PRESENCE OF MALICE TO NEGATE DEFENCE OF QUALIFIED PRIVILEGE

[59] In a situation where the defendants published defamatory statements on a privilege occasion, it is presumed that the defendants published it honestly believing that the statements to be true unless the plaintiff can prove that the statements were actuated and motivated by express or actual malice.

[60] In the case of *Hoe Thean Sun & Anor v Lim Tee Keng* [1999] 3 MLJ 138, held:

> (1) ... *However, when the publication takes place under circumstances which create qualified privilege, the presumption of malice is rebutted by the privilege and the plaintiff has to prove express or actual malice* on the part of the person responsible for the publication to defeat the privilege. *The law clearly recognises that all statements made in a police report are statements made on a privileged occasion. However, the privilege is qualified and not absolute* (see p 142 B–D).
>
> (2) *The onus lies on the plaintiff to prove malice and not the defendant to prove his bona fides or absence of malice.* When the occasion is privileged, the bona fides of the defendant is always presumed. (Emphasis added.)

[61] The effect of proving express or actual malice in the context of the defence of qualified privilege was described by Bankes J in *Smith v Streatfeild and others* [1913] 3 KB 764 at pp 769–770 as such:

> The principle upon which the law of qualified privilege rests is, I think, this: that where words are published which are both false and defamatory the law presumes malice on the part of the person who publishes them. The publication may, however, take place under circumstances which create a qualified privilege. If so, the presumption of malice is rebutted by the privilege, and ... the plaintiff has to prove express malice on the part of the person responsible for the publication. *The effect of proving express malice is sometimes spoken of as defeating the privilege.* ...
>
> [A]Although the occasion remains a privileged occasion, the privilege *afforded by the occasion ceases to be an effective weapon of defence. ... Qualified privilege is a defence only to the extent that it throws on the plaintiff the burden of proving express malice. Directly the plaintiff succeeds in doing this the defence vanishes, and it becomes immaterial that the publication was on a privileged occasion.* (Emphasis added.)

[62] In our instant case the plaintiff had averred in her reply to the statement of defence that the defendants had maliciously published the alleged defamatory statements. The evidence before the court showed that the defamatory statements were made by the third defendant pursuant to the plaintiff's request for the registration of the shares she bought from the other shareholders to her name. No evidence was advanced to show that there was a resolution at the material time (2008) to limit the purchase of the companies'

shares by the employer (the defendants). During the trial, the director's circular resolution dated 2 December 2013 was tendered by Encik Zawawi Ismail (DW4) and marked as exh D5. Such a resolution cannot take retrospective effect since it was passed five years after the letters dated 22 August 2008 and 20 December 2008 were issued to the plaintiff. This shows that the restriction to purchase the companies' shares has never been raised by the defendants' prior to the resolution dated 2 December 2013.

[63] Further, the company secretary had even reminded the defendants as early as in year 2002 that there was no provisions in the articles of association and the company's memorandum to refuse the registration or the transfer of the companies' shares (see p 113 CBD-A). In addition, the issue on the share limit had been decided in a suit commenced by the plaintiff vide Suit No 24–1239 of 2009 in which the Shah Alam High Court, (another court), held that the said shares purchased by the plaintiff should be registered in the plaintiff's name. There is no appeal against that decision.

[64] Further, the letter dated 20 December 2008 provides proof of malice on the part of the defendants'. In its clear unambiguous words in para 2 of the said letter, it reads as follows:

> Malangnya beliau telah menyalahgunakan kuasa beliau dengan mempengaruhi pemegang saham lain supaya menjual saham mereka kepada beliau dan *beliau berjaya memperolehi saham berjumlah 48,786 unit. Sekiranya perkara tersebut tidak disekat mungkin satu hari nanti syarikat ini akan berpindah milik ke tangan beliau.* (Emphasis added.)

[65] In other words, the plaintiff has acquired 48,786 share units in the defendants companies and the defendants are fearful that if she is not restrained or prevented from further acquiring more shares, one day, the defendants' companies would be owned by her.

[66] Thus it is clear that the defamatory statements were indeed actuated by malice. There was no domestic inquiry held against such serious allegations and this was admitted by Encik Harun Shafiee (DW3) himself. The police report was not lodged in 2007 when the alleged misappropriation of money was said to have been discovered by the defendants'. The plaintiff's testified that the plaintiff's allowances and salaries had been deducted since 2006 and 2008. However, the police report and the termination letter were only made on 28 July 2011, a period of three years later.

[67] The law says that the presence of malice can only be deduced or inferred from the circumstances of each case. Wan Hamzah J (as His Lordship then was), in the case of *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173 at p 179 states:

Where the defendant purposely abstained from inquiring into the facts or from availing himself of means of information which lay at hand when the slightest inquiry would have shown the true situation, *or where he deliberately stopped short in his inquiries in order not to ascertain the truth, malice may rightly be inferred*: *Lee v Ritchie* (1904) 6F (Ct of Sess) 642. (Emphasis added.)

[68] Based on all of the above, the defence of qualified privilege must fail since the publication of the slanderous and defamatory statements against the plaintiff were actuated by express or actual malice; that is, the defendants' jealousy towards the plaintiff who had accumulated 48,756 unit of shares and the fear of the defendants that if the plaintiff is not restrained or prevented from buying more shares, that one day, their companies will be owned by her.

QUANTUM OF DAMAGES

[69] The plaintiff in the present case submitted the sum of RM400,000 to be awarded as general and exemplary damages. In the law of defamation, it is trite law that the plaintiff need not plead nor prove damage if the claim is for general damages. It is solely within the discretion of the judge. However the damages should be fair and adequate.

[70] In *Gatley on Libel and Slander* (11th Ed), it states that the factors that can be taken into consideration when assessing damages are the conduct of the claimant, his position and standing, the nature of the slander or libel, the mode and extent of the publication and the absence or refusal of any retraction or apology.

[71] The plaintiff's reputation has been injured. The slanderous words and libelous statements affected her position as the manager at the material time. It lowers the plaintiff in the estimation of reasonable people and she was regarded with hatred, contempt and ridicule not only by the staff in the defendants' companies but also by her superiors. She was later suspended and a police report alleging that she had committed criminal breach of trust by misappropriating or siphoning off the companies' money was made against her by the defendants'. The shares that she had bought from the other shareholders were not allowed to be transferred into her name and she had to bring a suit in court to have it registered in her name. Subsequently she was suspended and terminated from the defendants' employment at the age of 51 years old and had to once again take recourse to the court (NCVC-22–889–07 of 2012) to have her allowance and pay reimbursed. In both the suits, she was successful and no appeals were lodged by the defendants'.

[72] In *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492, where no substantial damages was awarded, at

p 332 it was stated:

> ... The tort of defamation exposed the defendant to a monetary remedy that included both vindication of the plaintiff to the public and as consolation to him for a wrong done. *Vindication of the plaintiff's standing in the community should be the focus of the remedy rather than any award of large sums of money for the plaintiff's hurt feelings.* (Emphasis added.)

[73] It must be noted that to allege or accuse a person of practicing deception in the purchase of the defendants' shares and misappropriating the funds of the defendants companies' by forging the companies cheques are grave allegations indeed. These are serious allegations which questioned not only her integrity and fitness for office but the police report which alleged misappropriation of the companies monies by forgery can lead to an investigation and a criminal charge being level at one.

[74] The defendants did not proffer any apology even after the plaintiff had won the two suites she had brought in court to have the shares registered in her name and to get back the allowance and salary that was deducted after she was suspended and terminated from the defendants' employment. I am of the considered view that in such circumstances the amount to be awarded should reflect the hardship that the plaintiff had to go through to vindicate herself in the eyes of not only the staff and superiors in the defendants' companies but also in the eyes of the public at large.

CONCLUSION

[75] The plaintiff's claim is allowed as prayed. Based on the circumstances of the case, the amount of RM150,000 is awarded as general damages to the plaintiff. Exemplary damage is not allowed. The prayer for an injunction and apology are also not allowed as general damages will suffice. Interest is allowed as per prayer (g) in the statement of claim at 8%pa from 22 August 2008 till full realisation.

COSTS

[76] Encik Jefri Jaafar prayed for RM40,000 as costs since eight witnesses had testified and the trial took about ten days to complete. Encik Swinder Singh Ram Singh prayed for RM5,000 as costs. In the circumstances of the case, I feel RM35,000 is adequate.

[77] The plaintiff's claim allowed with RM35,000 costs.

Claim allowed and plaintiff awarded RM150,000 in general damages and her prayers for exemplary damages, an injunction and an apology dismissed

Reported by Ashok Kumar